the delivery. Whatever decision they reach is, in the ordinary case, the result of construction, and such construction as that suggested would give fullest effect to the policy suggested by the recent recognition of delivery in escrow to the payee.

TORT JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION. — Section 16 of the Act to Regulate Commerce, as amended June 29, 1906,[1] provides that "if . . . the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled. . . . " The Interstate Commerce Commission is thus invested with jurisdiction of claims for all injuries which are caused by violations of the Act. The act complained of, however, must have been in violation of the statute at the time it was committed, and not merely because of some subsequent order of the Commission or change in conditions.[2] That this so-called "reparation" section amounts to nothing more or less than an investiture with jurisdiction over a certain number of torts (which usually were also torts at common law) was at one time clearly recognized by the Commission.[3] Such a recognition might be advisable now, in view of recent hastily considered decisions[4] of the Commission awarding damages for injuries caused by negligent misrepresentation — which generally are not torts at common law.[5] And it should also be remembered that the Commission's jurisdiction is not exclusive of that of a common-law court, provided the plaintiff is able to sustain his cause of action in the latter without the aid of a finding by the Commission.[6]

---

[1] 34 STAT. AT L. 584, 590.

[2] New Pittsburgh Coal Co. *v.* Hocking Valley R. Co., 26 Int. Com. Rep. 121; *In re* Wool, Hides and Pelts, 25 Int. Com. Rep. 675.

[3] "Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort . . . If an injury is sustained on account of a violation of law, the proceeding is in its nature *ex delicto*, and therefore carries with it none of the features or incidents of an action *ex contractu*. In the very nature of the thing no protest is necessary where an injury is inflicted by the commission of a tort. The violation of the law produces the injury and completes the offense, and the person injured does not have to perform any conditions to entitle him to recover for the damage sustained." Southern Pine Lumber Co. *v.* Southern Ry. Co., 14 Int. Com. Rep. 195, 197.

[4] Healy & Towle *v.* Chicago & Northwestern Ry. Co., 43 Int. Com. Rep. 835; *cf.* Rutland & Rutland *v.* Chicago, Rock Island & Pacific Ry. Co., 19 Int. Com. Rep. 108; Wolverton *v.* Union Pacific R. Co., 31 Int. Com. Rep. 23, 24; Brittain *v.* Nashville, Chattanooga & St. Louis Ry., Unreported Opinion A-581.

[5] See Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184; *cf.* SALMOND, TORTS, 3 ed., 450.

[6] *Cf.* WATKINS, SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT, 2 ed., 601. See also Michigan Hardwood Manufacturers' Ass'n *v.* Transcontinental Freight Bureau, 27 Int. Com. Rep. 32, 37: "In giving the Commission jurisdiction over reparation, it was the manifest intent of Congress to provide shippers with a method of obtaining an award of damages accruing by virtue of the violation of the Act, without resort to the expensive and tedious processes of the law."

For the effect of the award of damages by the Commission, and the means of enforcing it, as provided by the Act, see Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717, 724.

"Reparation" is a curious misnomer for this jurisdiction, which is, as has been pointed out, purely to give damages for torts; and it should be observed that section 16 consistently speaks of "awarding damages," and nowhere uses the word "reparation." The widespread use of that word is not only incorrect but also unfortunate, for it tends to confuse this jurisdiction with other powers of the Commission which are in their nature more or less equitable. Such confusion is all the more likely, since the Commission has consistently made its award of damages purely discretionary.[7] The exercise of the discretion, however, depends not upon the equitable balance of convenience, but upon the public interests involved.[8] Thus, a plaintiff having a clear case for damages was nevertheless denied, because to award them to him would, in ultimate effect, disturb the equality of rates between districts.[9] So also damages are not always awarded in an uncontested case, because of the possibility that thus collusively a rebate may be obtained.[10]

The Commission's award is for damages plus interest,[11] in accordance with the better rule in actions at law for torts which are in the nature of injuries to property.[12] And exemplary damages will not be given,[13] perhaps because of the anomalous nature of such damages, but more probably because the Act contains explicit provisions in other sections for penalties for its violation. An assignee of a claim will be awarded damages.[14] Since the Act expressly establishes a limitations period, there has been much dispute whether laches should bar the claimant prior to the expiration of the statutory period.[15] It would seem that laches should be no bar.[16]

Section 16, it should be noticed, provides only for an award of damages against "the carrier." This provision seems to have been violated by the Commission's action in sometimes (not always) taking into account undercharges by the carrier in making its awards.[17] The carrier is thus enabled to secure damages from the undercharged shipper, in the guise

---

[7] Despite the fact that section 16 uses the mandatory "shall."

See the cases cited in LUST, SUPPLEMENTAL DIGEST NO. 1 OF DECISIONS UNDER THE INTERSTATE COMMERCE ACT, 519.

[8] Joynes *v.* Pennsylvania R. Co., 17 Int. Com. Rep. 361.

[9] Youngstown Sheet & Tube Co. *v.* Pittsburgh & Lake Erie R. Co., 27 Int. Com. Rep. 165.

[10] Thus, Elden *v.* Southern Pacific Co., 38 Int. Com. Rep. 530: "A mere willingness to pay reparation without evidence that the rate charged was unreasonable is not sufficient upon which to base an award of reparation."

[11] International Agricultural Corporation *v.* Louisville & Nashville R. Co., 29 Int. Com. Rep. 391.

[12] See SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, 2 ed., 137 *et seq.*

[13] Eichenberg *v.* Southern Pacific Co., 28 Int. Com. Rep. 584.

[14] Jublitz *v.* Southern Pacific Co., 27 Int. Com. Rep. 44.

[15] See Kindelon *v.* Southern Pacific Co., 17 Int. Com. Rep. 251, 252; 1 DRINKER, THE INTERSTATE COMMERCE ACT, 440; 25 HARV. L. REV. 665.

[16] 25 HARV. L. REV. 665.

[17] See the cases in LUST, SUPPLEMENTAL DIGEST NO. 2 OF DECISIONS UNDER THE INTERSTATE COMMERCE ACT, 802.

Cf. in this connection Manufacturers' Ry. Co. *v.* St. Louis, Iron Mountain & Southern Ry. Co., 28 Int. Com. Rep. 93, especially at p. 108: "An award of reparation is due only from a carrier to a shipper, and not to one carrier, as a carrier, from another." There is apparent no reason for such an exercise of the Commission's discretion. Section 16 says only "any party complainant" may recover.

of set-off or counterclaim. It is apparently the case, however, that this limitation of jurisdiction to suits against carriers is an inadvertent one, since section 16 obviously intends to allow an award of damages for any violation of the Act; and since there are many sections of the Act which can be violated by others than carriers, whose violation is equally deserving of an award of damages.[18]

The Commission has awarded damages for many different torts. "Unjust discrimination" and "undue preference" cases have arisen frequently, and damages have been awarded.[19] These injuries, aside from their status under the technical common law of carrier and shipper, or carrier and passenger, are certainly comprehended within the modern common-law definition of a tort as any injury inflicted intentionally and without justification.[20] In an early case [21] the Commission decided that one such discrimination (here the ejection of a negro from a car) was a trespass. It is obvious that the discrimination might equally well take the form of an assault or a battery, and probably of a libel or a slander. Over such torts as these the Commission would seem to have jurisdiction, provided always that they are committed in violation of the Act. That, indeed, should be clearly recognized to be the only limit to the Commission's jurisdiction,[22] although it might be well to decline to exercise the juris-

[18] For example, section 10.

[19] See Eichenberg *v.* Southern Pacific Co., 14 Int. Com. Rep. 250, 271; Meeker & Co. *v.* Lehigh Valley R. Co., 21 Int. Com. Rep. 129, 137. In the latter case the award was approved by the United States Supreme Court, S. C., 236 U. S. 412. See 1 DRINKER, *supra*, for discrimination, whether of facilities or of charges, pp. 433–434, 435; for preference among localities, p. 435.

[20] 29 HARV. L. REV. 559; 30 HARV. L. REV. 292. It might here be observed that this finding of justification comes singularly close to the "discretion" which the Interstate Commerce Commission exercises.

[21] Councill *v.* Western & Atlantic R. Co., 1 Int. Com. Rep. 339. The Commission was stopped from awarding damages in this case only by the doctrine which it then held, that the Seventh Amendment required the intervention of a jury in such cases as these. See Heck & Petree *v.* The East Tennessee, Virginia & Georgia Ry. Co., 1 Int. Com. Rep. 495, 502; Riddle, Dean & Co. *v.* New York, Lake Erie and Western R. Co., 1 Int. Com. Rep. 594, 607. Happily this doctrine was soon abandoned, following the Amendment of March 2, 1889, which provided for a trial by jury on suits on the Commission's awards. See WATKINS, *supra*, 601.

[22] *Cf.* 1 DRINKER, *supra*, 388: The Interstate Commerce Commission "cannot award damages for defective service, or for failure to make schedule time, or for breach of contract, or for conversion of chattels" (citing cases). This statement is, of course, incorrect; the Commission may, in a proper case, give damages for any of these things. The truth is that the Commission has unwisely used broad language with great frequency. Thus: "The commission's jurisdiction over claims for reparation does not extend to claims for loss, damage, or delay to shipments in transit, such claims being cognizable in the courts." Atlas Portland Cement Co. *v.* Louisville & Nashville R. Co., 32 Int. Com. Rep. 487, 488.

As regards the breach of contract claim, see Bichel *v.* Atchison, Topeka & Santa Fe Ry. Co., 19 Int. Com. Rep. 499. Here plaintiff purchased from defendant a coupon book of tickets, with a provision that the coupons could be redeemed only within eighteen months. After more than eighteen months had elapsed, plaintiff sued; this provision was held void, and damages were awarded to the amount of the unused coupons. *Cf.*, however, Larkin Co. *v.* Erie & Western Transportation Co., 24 Int. Com. Rep. 645; and see McArthur Brothers Co. *v.* El Paso & Southwestern Co., 34 Int. Com. Rep. 30, in which case an award for breach of contract was refused, rightly, because the breaking of the contract was not a violation of the Act. It is, of course, obvious that there are many contracts breach of which is in violation of the Act. But see WATKINS, *supra*, 329.

diction in some cases of minor injuries.[23] Damages have frequently been awarded to a shipper who has been overcharged, whether directly [24] or indirectly,[25] since such overcharge is prohibited by the Act, if direct, and if indirect is effected by methods prohibited by the Act.[26] Among such indirect methods of effecting an overcharge is the negligent misrepresentation as to cost of transportation, referred to above.[27] And damages have even been given by the Commission in the still more extreme case of a misrepresentation (here a failure to post a new and higher tariff, relied on by plaintiff to his indirect loss) that was neither intentional nor negligent.[28] The failure to post the tariff, however, was, regardless of its cause, a violation of the Act, and hence the Commission was right in holding the carrier for any damage caused thereby.

The Commission is no doubt wise in declining to let its tort jurisdiction crystallize into the common-law classifications of torts. Such a refusal is in accordance not only with the purpose of section 16, but also with the growing tendency to abolish all classifications of torts.[29] But, nevertheless, it is desirable that the Commission realize clearly what it is doing, in the light of the common law, when it awards damages in a given case.

CONTRACTS TENDING TOWARD MONOPOLY. — The prevailing economic theories tell us that a monopoly is injurious to the public interest and to be avoided. By monopoly apparently is meant a real monopoly, an exclusive control of a certain business by one group of persons — a situation such that all competition is permanently excluded.[1] A monopoly prevents the salutary action of competition upon prices, and makes the desire of the monopolist the chief and perhaps the only determinant of price. Further, it closes the field of the particular business to all others

---

[23] See Joynes *v.* Pennsylvania R. Co., 17 Int. Com. Rep. 361, 365 *et seq.* This case shows a strong tendency on the part of the Commission to limit its awards to cases where the tort has what might be termed an "interstate rate savor," analogous to the "maritime savor" test for an admiralty court's jurisdiction in some cases.

[24] "The Act entitled shippers to just and reasonable transportation charge, and if these carriers have imposed upon these complainants rates in excess of this they have thereby damaged the complainants to the extent to which reparation should be allowed." *In re* Advances on Live Stock, 28 Int. Com. Rep. 332, 335. See also Michigan Hardware Manufacturers' Ass'n *v.* Transcontinental Freight Bureau, *supra.*

[25] Damages given for higher rates collected because of misrouting: see Kile & Morgan Co. *v.* Deepwater Ry. Co., 15 Int. Com. Rep. 235; because of misquotation concerning route, rate or privileges: Kiel Woodenware Co. *v.* Chicago, Milwaukee & St. Paul Ry. Co., 18 Int. Com. Rep. 242; Stone & Meyers Co. *v.* Toledo, St. Louis & Western Ry. Co., Unreported Opinion A-52; Maldonado & Co. *v.* Southern Pacific Co., Unreported Opinion A-18; Rutland & Rutland *v.* Chicago, Rock Island & Pacific Ry. Co., *supra* (but *cf.* Faribault Furniture Co. *v.* Chicago Great Western R. Co., 25 Int. Com. Rep. 40, 41); because of furnishing unnecessarily expensive equipment: Calvi *v.* Chicago, Milwaukee & St. Paul Ry. Co., Unreported Opinion 461; Moline Plow Co. *v.* Chicago, Milwaukee & St. Paul Ry. Co., Unreported Opinion 419.

[26] For these methods, see note 25, *supra.*

[27] See note 4, *supra.*

[28] Rutland & Rutland *v.* Chicago, Rock Island & Pacific Ry. Co., *supra.*

[29] See the references in note 20, *supra;* also Jeremiah Smith, "Tort and Absolute Liability — Suggested Changes in Classification," 30 HARV. L. REV. 241, 260.

[1] See ELY, MONOPOLIES AND TRUSTS, for a full discussion of the question.